

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH
JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
Petitioner,

v.

UPTONS, INC., a Delaware corporation,

Respondent

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by UPTONS, INC., a Delaware corporation located in Norcross, Georgia ("Respondent" or "Uptons"), to PAUL G. SUMMERS, Attorney General and Reporter for the State of Tennessee ("Attorney General") on behalf of MARK WILLIAMS, the Director of the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance ("Division").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division and the Attorney General conducted an investigation of specific business practices of Respondent. These practices include conducting going out of business sales at Respondent's Tennessee store locations for more than ninety (90) days in violation of Tennessee law. Respondent also refused to honor its refund policy for consumer's that purchased pre-going out of business when a refund policy was in place. Respondent's business practices are more fully described in the State's Petition. As a result of the investigation, the Division and the Attorney General determined that certain acts and practices of Respondent violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.* (the "Act").

B. Respondent admits no wrongdoing. Further, pursuant to Tenn. Code Ann. § 47-18-107(c), acceptance of this Assurance by Respondent shall not be considered an admission of a prior violation of the Act.

C. Therefore, pursuant to Tenn. Code Ann. § 47-18-107, Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

1. DEFINITIONS

As used in this Assurance and accompanying Agreed Order, the following words or terms shall have the following meanings:

1.1 "Assurance of Voluntary Compliance" or "Assurance" shall refer to this document entitled Assurance of Voluntary Compliance in the matter of State of Tennessee v. Uptons, Inc, a Delaware corporation.

1.2 "Consumer" means any person, a natural person, individual, governmental agency or other entities, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

1.3 "Division" or "Division of Consumer Affairs" shall refer to the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance.

1.4 "Respondent" shall refer to Uptons, Inc. and/or any and all officers, employees, agents and representatives of Uptons, Inc.

1.5 "Petitioner", "State of Tennessee", or "Attorney General" shall refer to the Tennessee Attorney General & Reporter and the Office of the Tennessee Attorney General.

1.6 "Tennessee Consumer Protection Act" or "Consumer Act" shall refer to the Tennessee Consumer Protection Act of 1977 and related statutes found at Tenn. Code Ann. §§ 47-18-101, *et seq.*

2. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering into and enforcing this Assurance and Agreed Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including enforcement of compliance therewith and assessment of penalties for

violation(s) thereof. Respondent agrees to pay all court costs and attorneys' fees and any costs associated with any successful petitions to enforce any provision of this Assurance and Agreed Order against Respondent.

3. VENUE

3.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

4. PERMANENT INJUNCTION

Accordingly, it is hereby agreed that upon approval of the Court, Respondent shall be permanently and forever enjoined and bound from directly or indirectly engaging in the practices set forth herein:

4.1 Respondent shall be prohibited from directly or indirectly engaging in any misleading, unfair or deceptive acts or practices in the conduct of its business. Respondent shall fully comply with all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*, including but not limited to §§ 47-18-104(a) and (b)(27), which prohibit unfair and deceptive acts and practices.

4.2 Respondent shall be prohibited from directly or indirectly advertising that it is "going out of business" or term or phrase of similar import, more than ninety (90) days before such business ceases to operate.

4.3 Respondent shall be prohibited from directly or indirectly failing to provide refunds to consumers for goods purchased that are defective if the consumer cannot determine that the item is defective until after it is purchased. Without limiting the scope of this section, for the purposes of this paragraph, clothing not enclosed in a package or otherwise packaged to prevent inspection by consumers, may be inspected by consumers at the store location for defects and therefore is not covered by this paragraph.

4.4 Respondent shall be prohibited from directly or indirectly, offering or promoting a refund policy to consumers and then retroactively changing that policy.

4.5 Respondent shall be required to honor its pre-closing refund policy for any consumer that purchased goods from the Respondent prior to the change in refund policy.

5. REFUNDS

5.1 Upon request, Respondent shall be required to provide a full refund to any consumer that purchased goods under the Respondent's pre-going out of business refund policy in accordance with the stated terms of such refund policy.

5.2 Upon request, Respondent shall be required to provide a full refund to any consumer that purchased goods from Respondent during the "going out of business" sale if the goods are defective and the consumer could not have determined that the goods were defective prior to purchase. Without limiting the scope of this section, for the purposes of this paragraph, clothing not enclosed in a package or otherwise packaged to prevent inspection by consumers, may be inspected by consumers at the store location for defects and therefore is not covered by this paragraph.

5.3 Within ten (10) days of entry of this Assurance, Respondent shall be required to affirmatively refund any and all Tennessee consumers that have a credit balance on their Upton's credit card, the total amount of the credit balance, including taxes and other fees.

5.4 Upon request, Respondent shall be required to provide a full refund to any consumer that purchased a gift certificate or received a gift certificate from the Respondent and was not able to use it. Further, if Respondent discovers any consumers from its own records that are due refunds for gift certificates or other items, Respondent shall affirmatively make full refunds to those consumers in accordance with this section within five (5) days of discovery.

5.5 Upon request, Respondent shall be required to provide a full refund to any consumer that paid on a layaway that the consumer did not receive. Further, if Respondent discovers any consumers from its own records that are due refunds for layaways, Respondent shall affirmatively make full refunds to those consumers in accordance with this section within five (5) days of discovery.

5.6 Within three (3) months of entry of this Assurance, Respondent shall provide an alphabetical list to the Attorney General of each consumer's name, address and the amount of refund of each refund any consumer receives refund under this section and a total of all refunds paid under this section. Said list shall be updated as necessary every three (3) months.

5.7 Upon entry of this Assurance, Respondent shall also provide the Director of the Division of Consumer Affairs with a name and address to forward requests for refunds under this section.

5.8 Respondent shall respond to all requests for refunds within ten (10) days of a receipt of a request for a refund. The refund shall include the cost of postage and packing to return the item to Respondent along with the full amount paid plus all taxes. Consumer refunds shall be made by check drawn on an account with a sufficient cash balance to fund all refunds and shall not consist of credits, discounts or other partial reimbursement of the purchase price. The refunds required by this section must be mailed via certified first class postage paid mail through the United States Postal Service. All envelopes must be clearly marked "POSTMASTER: ADDRESS CORRECTION REQUESTED". In the event any envelope is returned with a corrected or forwarding address, Respondent shall again remail the refund to the consumer via certified mail through the United States Postal Service at the correct address.

5.9 In the event Respondent is unable to locate consumers entitled to a refund, those funds due such consumers shall be treated as unclaimed property and placed in the appropriate state's unclaimed

property account pursuant to the applicable Uniform Disposition of Unclaimed Property Act. These funds may be delivered to the treasurer prior to the statutory due date. The Respondent shall provide a report to the Attorney General and Reporter within six (6) months of the entry of the Order which details the amounts delivered to the treasurer for treatment as unclaimed property under the State statute. The Respondent shall continue to provide this information every six (6) months for a period of three (3) years. The Respondent shall provide all information necessary to the applicable state treasurer's office to appropriately handle such funds as unclaimed property as set forth by statute and regulation.

5.10 Respondent is responsible for all costs associated with the refund process set forth in subsection 5, including, but not limited to, all costs associated with the mailing, postage and other costs associated with the issuance of refund checks. 5

.11 Within four (4) months of entry of this Assurance, Respondent shall also provide a report to the State that verifies and certifies that eligible consumers who requested refunds and who have requested a refund have, in fact, received a full refund.

5.12 Within ten (10) days of receipt of a request from the Division of Consumer Affairs for evidence that a specific consumer or consumers have received a refund, Respondent shall provide any documents, books and/or records necessary to establish to the satisfaction of the Director of the Division of Consumer Affairs that the refund process complied with this Assurance and Agreed Order. These documents may include, but shall not be limited to, copies of the front and back of canceled checks and/or mailing records along with certified mail receipts indicating that the identified consumer or consumers received a refund. The documents, books or records shall be physically turned over and provided to the Division of Consumer Affairs' offices no later than ten (10) days from receipt of such request. This paragraph shall in no way limit the Attorney General's or the Division of Consumer Affairs' right to obtain documents, records and/or testimony through any other state or federal law, regulation or rule.

6. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

6.1 Respondent shall pay the sum of Five Thousand and 00/100 Dollars (\$5,000.00) to the State of Tennessee for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Said payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check made payable to the State of Tennessee on the day of execution of this Assurance.

6.2 Respondent's parent company American Retail Group, Inc. agrees to guarantee the payment set forth in 6.1 and 7.1. If Respondent does not pay the sums set forth therein within ten (10) days of entry of this Assurance, American Retail Group, Inc. shall pay the full sum within ten (10) days of a written demand for payment. American Retail Group, Inc. agrees to be subject to enforcement action in this court if it fails to pay the guaranteed amount within ten (10) days of a written demand for payment by the State.

7. CIVIL PENALTIES

7.1 Respondent shall pay the sum of Ten Thousand and 00/100 Dollars (\$10,000.00) to the State of Tennessee as a civil penalty pursuant to Tenn. Code Ann. § 47-18-108(b)(3). Said payment shall be made by providing the Attorney General or his designated representative a cashier's or certified check made payable to the State of Tennessee on the day of execution of this Assurance.

8. MONITORING AND COMPLIANCE

8.1 Upon request, Respondent agrees to provide books, records and documents to the State at any time, and further, to informally or formally under oath, provide testimony and other information to the State relating to compliance with this Assurance. Respondent shall make any requested information available within two (2) weeks of the request, at the Office of the Attorney General or at any other location within the State of Tennessee or within a time frame that is mutually agreeable in writing to the Respondent and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

8.2 The State of Tennessee has the right to test shop Respondent for the purpose of confirming compliance with this Assurance and state law. The test shoppers are not required to disclose that they are representatives of the State of Tennessee when making contact with Respondent. Further, the State of Tennessee may record any or all aspects of its visit(s) to Respondent in audio or video form without notice to Respondent.

8.3 The Respondent shall be required to notify the State thirty (30) days prior to opening any stores in the State of Tennessee. Said notice shall be in writing and include the address of the proposed store location and the proposed name of the store. Further, Respondent shall be required to notify the State within 3 days of the announcement of any going out of business sales in the State. Said notice shall be in writing and include the address of the store location, the date the going out of business sale commenced and the date the going out of business sale will cease.

9. PRIVATE RIGHT OF ACTION

9.1 Pursuant to Tenn. Code Ann. § 47-18-109 and 47-18-108(e), nothing in this Assurance shall be construed to affect any private right of action that a consumer or any other person may hold against Respondent.

10. PENALTY FOR FAILURE TO COMPLY

10.1 Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is *prima facie* evidence of a violation of the Tennessee Consumer Protection Act.

10.2 Respondent understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including but not limited to contempt sanctions and the imposition of attorneys' fees and civil penalties. Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce this Assurance and Order against the Respondent.

11. REPRESENTATIONS AND WARRANTIES

11.1 Respondent represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations. The parties warrant that they will implement the terms of this Assurance in good faith. Further, no offer, agreements, or inducements of any nature whatsoever have been made to it by the State of Tennessee, its attorney or any employee of the Attorney General's Office or the Division of Consumer Affairs to procure this Assurance.

11.2 Respondent represents that signatories to this Assurance have authority to act for and bind the Respondent.

11.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

11.4 Neither Respondent nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Commerce and Insurance, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

11.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's advertising or other business practices.

11.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of its officers, directors, employees and any third parties who act directly or indirectly on behalf of the Respondent as an agent or independent contractor who is involved in conducting business in the State of Tennessee. Within forty-five (45) days of entry of this Assurance, Respondent shall provide the State with an affidavit verifying and certifying that all required persons have been supplied with a copy of this Assurance.

11.7 Respondent warrants and represents that it is the proper party to this Assurance and Order. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive, unfair or inaccurate, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if the State so elects.

11.8 Uptons, Inc. represents that it is the true legal name of the entity entering into this Assurance of Voluntary Compliance and Agreed Order. Respondent understands that the State expressly relies upon this representation and if this representation is false, unfair, deceptive, inaccurate or misleading, the State shall have the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if the State so elects.

11.9 This Assurance and Agreed Order may only be enforced by the parties hereto.

11.10 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

11.11 This document shall not be construed against the "drafter" because both parties participated in the drafting of this document.

11.12 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

11.13 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Assurance shall not bar the State, a District Attorney General, the City of Nashville or other governmental entity or municipality from enforcing laws, regulations or rules against Respondent.

11.14 This Assurance shall be binding and effective against Respondent upon Respondent's execution of the Assurance. In the event the court does not approve this Assurance, this Judgment shall be of no force and effect against the State of Tennessee.

11.15 Respondent had the benefit of corporate legal counsel in this matter.

11.16 Nothing in this Assurance constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

11.17 Respondent represents and warrants that it obtained the required "going out of business" licenses from each municipality that it has conducted such sales if the municipality required such a license. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive, unfair or inaccurate, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt, if the State so elects.

12. COMPLIANCE WITH ALL LAWS, REGULATIONS AND RULES

12.1 Nothing in this Assurance and Order shall be construed as relieving Respondent of the obligation to comply with all state or federal laws, regulations or rules.

13. FILING OF ASSURANCE

13.1 Upon the execution of this Assurance, the Attorney General shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which it may have to be heard in connection with judicial proceedings upon the Petition. Respondent agrees to pay all costs of filing such Petition, Assurance and Agreed Order. Simultaneously with the execution of this Assurance, Respondent shall execute an Agreed Order. This Assurance is made a part of and is incorporated into the Agreed Order. The Respondent agrees that it consents to the entry of this Assurance and Agreed Order without further notice. The State agrees to provide the Respondent with a copy of the approved Agreed Order provided that the Respondent pays any costs associated with obtaining a copy of said order.

14. APPLICABILITY OF ASSURANCE TO RESPONDENT AND ITS SUCCESSORS

14.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to it, each of its officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, joint venturers, persons or other entities it controls, manages or operates, its successors and assigns, and to other persons or entities acting directly or indirectly on its or their behalf.

15. NOTIFICATION TO STATE

15.1 Any notices required to be sent to the State or the Respondent by this Assurance shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State:

Carolyn U. Smith
Assistant Attorney General
Office of the Attorney General
Consumer Protection Division
425 Fifth Avenue North, 2nd Floor
Nashville, Tennessee 37243

For the Respondent:

General Counsel
Uptons, Inc c/o American Retail Group,
Inc.
6251 Crooked Creek Road
Norcross, GA 30092
tel: (770) 409-6700
fax: (770) 300-9831

15.2 For five (5) years following execution of this Assurance, Respondent shall notify the Office of the Attorney General, in writing, at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a

successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Respondent's status that may effect compliance with obligations arising out of this Assurance.

16. COURT COSTS

16.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116. Further, no discretionary costs shall be taxed to the State.